

BETWEEN: Robert Sugden
Applicant

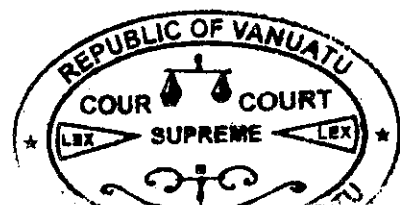
AND: The Republic of Vanuatu
Respondent

Date of Decision: Monday 30 April 2018
Before: Justice G.A. Andrée Wiltens
Counsel: Mr R Sugden for Applicant
Mr K Tari for Respondent

JUDGMENT

A. Background

1. Although this file is quite voluminous, much of the history of the matter can be put aside. The dispute between the parties involves an attempt to sell an interest in property, and the desire to settle that transaction by the transfer of appropriate title as against a claimed entitlement to collect land rent and lessor's benefit. The parties were unable to work out a satisfactory arrangement to resolve the matter, and the dispute was so protracted that the proposed sale fell through.
2. There is now a new proposed sale, and the vendor is anxious to avoid the same difficulties thwarting this transaction. Accordingly, urgent interim orders were sought to try and address that. The Court saw the merit of the vendor's proposals and required a swift response from the State, failing which the Court indicated it intended to grant the application. Common sense then prevailed, and with the benefit of a short-timed case management conference, all the



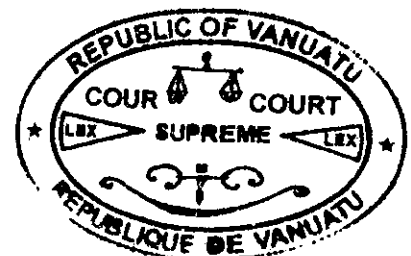
interim issues were resolved by undertakings and certain Court orders with sufficient funds retained in trust to satisfy the pending outcome of the real issues between the parties – namely, whether and to what extent, if any, land rent and lessor's benefits are payable; and also, whether or not the Department of Lands is the appropriate collection agency for these types of payments in this instance.

B. Method

3. Counsel are agreed that the Court should now proceed to determine the outstanding areas of dispute "on the papers", taking into account the following:
 - (i) the claim of 10 October 2017;
 - (ii) the submissions of 20 September 2017;
 - (iii) the memorandum of 24 October 2017;
 - (iv) the submissions in response of 31 October 2017; and
 - (v) the supplementary memorandum of 14 December 2017.

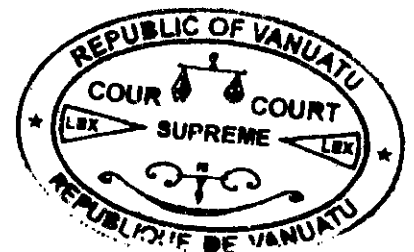
C. The Claim of 10 October 2017

4. Mr Sugden obtained mortgagee powers of sale over title 11/OC22/009 in November 2016, following a civil claim. In May 2017, the Acting Director of Land Records registered a caution against that title. Mr Sugden says he was not notified of that.
5. In June 2017 Mr Sugden signed a contract for the sale of that title. He shortly thereafter came up against the caution, which the Acting Director is said to have agreed to withdraw in August 2017 but did not actually withdraw.
6. Mr Sugden was required to obtain the lessor's consent to the proposed transfer – the lessor being the Minister of Lands. The Department of Lands refused to process the Minister's consent and also sought land rent allegedly owed. Two further cautions were registered against the title to Mr Sugden's upset; and ultimately the proposed sale which was due to settle at the end of August 2017 was abandoned.
7. While attempting to achieve settlement, the issue of allegedly outstanding land rent was further debated, and the matter of lessor's benefit was also raised. Mr Sugden disputed owing any land rent, and objected to being asked to also pay lessor's benefit. He questioned the lawfulness of such "debt collection" preventing registration of the proposed transfer – he insisted that registration ought to proceed unimpeded and invited a counter-claim to determine the alleged debt issues. He sought a number of interim orders that do need to be elaborated here.



D. The Submissions of 20 September 2017

8. Mr Sugden's submissions in support of the interim orders point out that land rent of well over VT3,000,000 was at first claimed, which was later reduced to VT902,700; and the sum of VT1,800,000 was sought by way of lessor's benefit. He maintained that the land rent figure was overstated and could in fact be in the negative; and further that no sum was claimable for lessor's benefit.
9. In respect of land rent, Mr Sugden submitted the figures were achieved using incorrect calculations. The annual rental as per the lease was VT80,240. The claim was for 10 years land rent, from 2008 to 2017. Mr Sugden maintained that:
 - as the lease had been he said "illegally removed" from the register between 6 September 2011 and 4 September 2011, the 10 year period ought to be reduced to 7 years, 2 days – he calculated that to be VT562,120;
 - he paid the 2008 rent personally, thereby reducing the amount due to VT481,880;
 - in 2008 VT428,880 land rent was actually paid, by dint of what he said was an "illegal rent review" – which was an overpayment of VT348,543; which has the effect of reducing the amount due to VT133,337; and
 - the illegal rent review had been applied from 2006, and as the Director was not claiming those arrears they must have been paid by the mortgagor – and if that is correct, then there has been an overpayment for the 2007 year, with the result that the lease rental is in fact in credit by VT215,206.
10. In relation to lessor's benefit, Mr Sugden submitted firstly that section 48B(2) of the Land Leases Act was unconstitutional; and secondly, that the section did not apply in this case.
11. He accepted that the section became law in February 2015 and that it applies "on the face of it" to leases already registered as at that date. The argument advanced was that all urban leases are included within the ambit of the section; and that the section therefore in the cases of pre-February 2015 transfers unjustly undermines the lessee's choses in action under Article 5(1)(j) of the Constitution.
12. Mr Sugden further submitted that section 48B(2) does not apply in a mortgagee situation, arguing that a proprietor ordinarily transfers a lease – and he was not the proprietor in this case.
13. Mr Sugden questioned the use of administrative control for the collection of both types of fees. His point was that registration is a function quite removed from fee recovery; and where documents are in order and the necessary registration expenses are tendered, then what Parliament intended was that registration would be effected. He described the attempt to make him pay these fees amounted to "extortion", and he pointed out that the Constitution and properly implemented Legislation sets out and limits the powers of all Government offices – and revenue gathering of this type is not included in any such provision.



E. The Memorandum of 24 October 2017;

14. Mr Sugden, as an officer of the Court, pointed out that section 9(2) of the Interpretation Act 2006, in cases where certain provisions are found to be in conflict with the Constitution, expressly preserves the validity of any part of an Act that does not conflict with the Constitution.
15. Mr Sugden accepted that this provision requires the Court to interpret section 48B(2) as affecting only post-February 2015 urban leases.

F. The Submissions in response of 31 October 2017

16. Mr Tari relied on section 62 of the Land Leases Act as establishing jurisdiction for land rent payments to be collected before registration is effected:

"62. Matters implied in transfer

- (1) On the transfer of a registered lease there shall be implied –

- (a) except in so far as the transferee may otherwise specify, a warranty, on the part of the transferor, that the rent and obligations incident to the lease have been paid and performed up to the date of transfer;"

17. Mr Tari submitted it was not possible to counter-claim for land rent as it is the transferee's obligation. He submitted it was not possible to register a transfer without land rent having been paid. He commented that Mr Sugden was not disputing that he owed land rent, only the amount.
18. Mr Tari accepted that the Department of lands cancelled the lease in September 2011 but restored the register in September 2014. He advised that the restoration was also a back-dating to October 2011 – and he submitted that land rent was due for the entire period as a result. He also pointed out that the land rent calculation took into the yearly rent of VT80,250 and 12.5% VAT, therefore amounting to VT90,270 per annum.
19. In relation to lessor's benefit, Mr Tari submitted that section 1 (b) defined "proprietor" as:

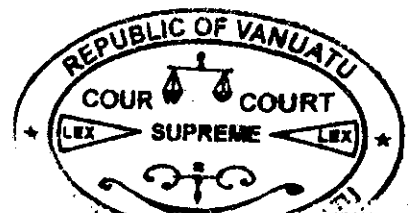
"in relation to a mortgage of a registered lease the person named in the register as the person in whose favour the mortgage is made;"

20. Mr Tari therefore submitted that Mr Sugden was the proprietor and caught by section 48B(2).

G. The supplementary Memorandum of 14 December 2017

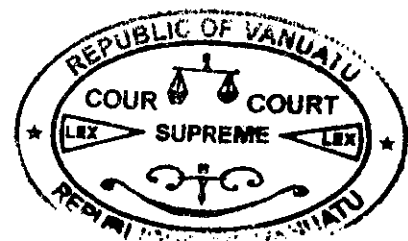
21. Mr Sugden subsequently also properly drew the Court's attention to section 50B of the Land Leases Act. That provides that where the proprietor of a lease wishes to transfer the lease or otherwise deal with the title, he or she is required to ensure certain Government or other outstanding debts or charges are settled; and pursuant to subsection (2):

"The director must not register any matter referred to in paragraph (1)(a), (b), or (c), if there are outstanding rates, charges or other debts owed by the proprietor in relation to that lease or sublease."



H. Discussion

22. Mr Tari's submission that registration could not be effected until payment had been received is an unattractive and incorrect statement. All that is required to effect proper registration is that the documents are in order and that the necessary fees are in hand.
23. The submission that the implied term indicates all is well with the title cannot impart on the Minister of Lands an ability or indeed obligation to satisfy him of herself that all inter-parties obligations have been satisfactorily resolved prior to registration being possible. All it does is afford the purchaser of some security and the possibility of enforcing as against the vendor any outstanding obligation.
24. The Court is not in a position to determine whether or how much land rent is owed, as there is no evidence before it as to the sums claimed by Mr Sugden as having been paid by him and/or others are correct or not. However, the following appears incontrovertible:
- VAT ought to be part of the calculation;
 - there is said to be a 10 year period when land rent was payable. It seems to me not to matter whether or not the lease was registered throughout that period or whether or not the restoration in the Register can be back-dated – the more telling point is whether or not the use of the land changed in any way during that period, such that the proprietor was unable to enjoy his legitimate use and enjoyment of the land. If so, then that 3 year period ought not to be part of the calculation. If the use and enjoyment continued uninterrupted, then the amount owing for land rent should be unaffected and the full 10 year period used to calculate the sum owing; and
 - the indiscretions Mr Sugden complains of regarding illegality and lack of compliance with undertakings and official obligations should be disregarded in determining this aspect of the dispute, aggravating as they have undoubtedly been for Mr Sugden.
25. I have not been helped at all by Mr Tari's submissions regarding whether or not lessor's benefit is contrary to Constitutional safeguards – he simply did not address the issue. However, somewhat bolstered by the provisions of section 9(2) of the Interpretation Act and Mr Sugden's concession, in my view, only urban leases entered into after February 2015 are caught by the section – the legislation is not retrospective. Accordingly, I reject the argument that the lessee's chuses in action are unjustly or in any other way unlawfully undermined under Article 5(1)(j) of the Constitution.
26. It is undisputed that the lessor was the Minister of Lands; and that land rent is said to be owing to a Government entity. If that is so, then the Acting Minister of Lands was not only entitled, but obligated, to not register the transfer sought. The same logic applies in respect of lessor's benefit – it is owing to the Minister of Lands and is therefore also within the ambit of section 50B(2) of the Land Leases Act.
27. Filed with Mr Tari's submission was a sworn statement by Mr Paul Gambetta. He purported to confirm the amount of land rent outstanding – but he too did not address the claims by Mr Sugden about what has been paid already. What he does do, is quantify the lessor's benefit at



VT3,890,000; and I did not sense that Mr Sugden was challenging that figure – rather has was challenging liability.

I. Result

28. Mr Sugden is to pay to the Minister of Lands the lessor's benefit of VT3,890,000.
29. Mr Tari, on behalf of the Republic, is to re-calculate the land rent, taking into account the factors I have detailed in paragraph 24 and all the payments Mr Sugden says have already been made.
30. He is to communicate the results of this to Mr Sugden within 10 working days. If the figures are accepted, that amount may be either added to or subtracted from the figure stated in paragraph 28.
31. If there is no communication to Mr Sugden in 10 days, I shall accept Mr Sugden's analysis on its face; and simply make the adjustments he claims plus VAT.
32. If there is still no agreement as to quantum, I shall receive such further evidence and written submissions as to quantum either party wishes me to consider up to 15 working days from today. Then I shall make a final determination – I hope it does not come to that.

J. Costs

33. As both sides have partly succeeded, it seems to me fair that costs lie where they fall. If either side wishes to challenge that they may file written submissions within 10 working days.

Dated at Port Vila this 30th day of April 2018
BY THE COURT

G.A. Andrée Wittens
Justice G.A. Andrée Wittens

